THE HON'BLE SRI JUSTICE B.SUDERSHAN REDDY

AND

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION No.15036 of 2005

Date: 08.08.2005

Between:

M/s. CMC Limited, 4-3-596/A, Posnet Bhavan, Tilak Road, Ramkoti, Hyderabad – 500 001.

… Petitioner

and

The Commercial Tax Officer, Abids Circle, Hyderabad and another.

… Respondents.

THE HON'BLE SRI JUSTICE B.SUDERSHAN REDDY

AND

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION No.15036 of 2005

JUDGMENT: (Per Sri Ramesh Ranganathan,J)

The assessment order passed by the 1st respondent-Commercial Tax Officer, Abids Circle, Hyderabad, in Assessment No.1568/2002-03 dated 10-5-2005, is impugned in this writ petition.

The facts, to the extent necessary for the purpose of this writ petition, are that the petitioner, a company carrying on business in purchase and sale of computers, computer software and computer peripherals, is a registered dealer under the A.P.G.S.T and C.S.T. Acts and an assessee in the records of the 1st respondent. For the assessment year 2002-03, the petitioner filed A-2 returns under the A.P.G.S.T. Act. On receipt of the show cause notice, issued by the 1st respondent on 31-7-2004, the petitioner filed a detailed representation on 15-10-2004 requesting that a portion of the turnover be exempted. The petitioner also contended that there was a mistake in computation of turnover tax and requested that the mistake be corrected. After inspection by the Regional Vigilance and Enforcement Office, Hyderabad (Rural), a notice was issued on 3-12-2004 directing the petitioner to furnish certain records for verification and to explain the nature of works executed by it during the

assessment years 2001-02 to 2004-05. In reply thereto, the petitioner submitted representations on 7-12-2004 and 22-12-2004.

Without referring to the earlier show cause notice dated 31-7-2004, another show cause notice was issued on 09.03.2005 proposing to levy tax on a turn over of Rs.18.42 Crores treating the said turnover as works contract. In reply thereto, the petitioner filed detailed objections on 28-4-2005 contending that no works contract was executed. In the said representation, the petitioner requested for an opportunity of personal hearing to explain certain facts and figures. The 1st respondent passed the assessment order dated 10-5-2005 without providing an opportunity of personal hearing to the petitioner. The petitioner's grievance is that its objections was not considered and that the impugned assessment order was passed on the basis of the report of the Regional Vigilance and Enforcement Officer, a copy of which was not even given to the petitioner before the assessment order was passed.

In the affidavit filed in support of the writ petition, various discrepancies and infirmities in the assessment order passed by the 1st respondent are highlighted. Reliance placed by the 1st respondent, on the judgment in **"South India Corporation Pvt. Limited v. Secretary, Board of Revenue"**, though the said judgment of the Kerala High Court was reversed by a Constitution Bench of **the Supreme Court,** is cited as one of the instances reflecting non-application of mind in passing the impugned order of assessment. The observation in the assessment order that there was no standard definition to the expression "works contract" in the statute is also faulted, since Section 2(1)(t) of the A.P.G.S.T. Act defines the expression "works contract".

In his counter affidavit, the 1st respondent contends that the writ petition is liable to be dismissed inasmuch as the petitioner has an effective alternative remedy under Section 19 of the A.P.G.S.T. Act. It is stated that a separate show cause notice

was issued on 9-3-2005, the objections filed by the petitioner to the earlier show cause notice as well as to the show cause notice issued on 9-3-2005 were carefully examined and thereafter the assessment order was passed. The various contentions raised by the petitioner, are disputed by the 1st respondent. It is stated that, in compliance with Section 14(1) of the A.P.G.S.T. Act, reasonable opportunity was given to the petitioner by way of the show cause notices dated 31-7-2004 and 9-3-2005, and that Section 14(1) does not require a personal hearing to be given. While denying the contention that the aforementioned two show cause notices contradict each other, the 1st respondent, however, admits that a wrong judgment was quoted in the assessment order by mistake, which mistake, it is contended, did not vitiate the assessment proceedings. It is further contended that the question whether the nature of activity was a works contract or an outright sale was purely a question of fact which has to be examined by the appellate authority under the provisions of the Act on the evidence available, that the petitioner has deliberately not invoked the appellate jurisdiction under Section 19, since it would be required to pay 12.5% of the disputed tax, a condition precedent for entertaining an appeal by the appellate authority, and it is only to avoid payment of this amount that the petitioner has approached this Court under Article 226 of the Constitution of India.

This Court, by order dated 13-7-2005, granted stay of further proceedings, pursuant to the assessment order dated 10-5-2005, for a period of two weeks, which was subsequently extended until further orders.

Sri V. Bhaskar Reddy, learned counsel for the petitioner, contends that the assessment order is replete with discrepancies, that the show cause notices dated 31-7-2004 and 9-3-2005 contradict each other, the figures reflected in the final assessment order dated 10-5-2005 are other than those found in the show cause notice dated 9-3-2005, that reliance was placed by the assessing authority on overruled judgments, and that the 1st respondent was unaware that “works contract”

is defined under the A.P.G.S.T. Act. Learned counsel contends that principles of natural justice have to be read into the statute, that the assessee is entitled, as of right, for a personal hearing when such a request is made and that failure to so provide is a denial of "reasonable opportunity" and in violation of principles of natural justice. Learned counsel further contends that since the assessment order is passed in violation of principles of natural justice, the alternative remedy of appeal under Section 19 of the Act is not a bar for invocation of the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India.

The contention that an opportunity of being provided personal hearing is an integral part of the rule of *audi alteram partem* shall first be examined. Section 14(1) of the A.P. General Sales Tax Act, which requires a reasonable opportunity to be given to the dealer, reads as under:

"14. Assessment of Tax:

(1) If the assessing authority is satisfied that any return submitted under Section 13 is correct and complete, he shall assess the amount of tax payable by the dealer on the basis thereof; but if the return appears to him to be incorrect or incomplete he shall, after giving the dealer a reasonable opportunity of proving the correctness and completeness of return submitted by him and making such inquiry as he deems necessary, assess to the best of his judgment, the amount of tax due from the dealer. An assessment under this Section shall be made only within a period of three years from the date of expiry of the year to which the assessment relates"

Section 14(1) not only mandates a reasonable opportunity to be given to the dealer to prove the correctness or otherwise of the returns submitted by him, it also empowers the assessing authority to make such enquiry as he deems necessary.

While principles of natural justice are required to be read into the unoccupied interstices of a statute, unless there is a clear mandate to the contrary (**Institute of Chartered Accountants of India v. L.K.Ratna**), the question which arises for consideration is whether the requirement of an oral haring is an integral part of the rule of *audi alteram partem* and comes within the scope of "reasonable opportunity"

under Section 14(1) of the A.P.G.S.T. Act.

This question is no longer *res integra.* In **Andhra Cements Ltd., v. Government of A.P.**, one of us (B.Sudershan Reddy,J), after referring extensively to several judgments held:

"Oral hearing is not an integral part of hearing, unless the circumstances are so exceptional that without oral hearing a person cannot put up an effective defence. The rule of audi alteram partem does not require full judicialisation in every case. An opportunity of being heard does not necessarily mean an opportunity of oral hearing is to be provided. It depends upon the nature of inquiry and the nature of right involved in a given case. An order or decision which may have the tendency to adversely effect the liberty or property rights may have to be preceded by a notice and oral hearing. In most of the cases where property rights or liberties are not involved, the type of hearing may depend upon variety of factors – whether oral hearing is necessary in such cases to large extent depend upon the view of the Tribunal or adjudicatory body. Oral hearing as such may be necessary in cases where the decision takes away some existing right or possession"

This judgment was confirmed in appeal by a Division Bench of this Court in **Andhra Cements Limited, Hyderabad v. Government of Andhra Pradesh.** While the requirement of giving an oral hearing neither forms an integral part of the rule of *audi alteram partem* nor does it come within the scope of "reasonable opportunity" under Section 14(1) of the A.P.G.S.T. Act we should not be understood to have laid down as a general principle, that in all cases the assessing authority should deny an opportunity of personal/oral hearing to the dealer. Section 14(1) requires the assessing authority, in addition to giving the dealer a "reasonable opportunity", to also make such enquiry as he deems necessary. In cases involving complicated questions of fact and law it may be necessary for the assessing authority, while making the enquiry, to give the dealer an opportunity of oral/personal hearing to enable him to assess the amount of tax due to the best of his judgment. All that we intend to hold is that it is not mandatory for the assessing authority to provide an oral/personal hearing to the dealer in every case where such a request is made. If, however, the assessing authority, on the facts and circumstances of a given case, considers it appropriate to give such an opportunity to a dealer, Section 14(1) does

not preclude him from doing so. We also make it clear that in cases where the statute itself requires an opportunity of personal/oral hearing to be given, such an opportunity cannot, normally, be denied.

Once it is held that the right of personal/oral hearing is not an intergral part of principles of natural justice and cannot be read into a Statute, which does not contain any specific provision in this regard, it would naturally follow therefrom that the words “reasonable opportunity” in Section 14(1) do not require an opportunity of oral/ personal hearing being given to the assessee and that failure to do so would not be in violation of principles of natural justice. It is not the petitioner’s case that complicated questions of fact and law are involved in the present case necessitating an oral hearing being given to the dealer to enable the assessing authority to assess the tax due to the best of his judgment. Failure to given an opportunity of oral hearing, in the present case, does not vitiate the order of assessment.

The next question which arises for consideration is whether in cases not involving violation of principles of natural justice or infringement of fundamental rights or where the order passed is within the jurisdiction of the authority passing it, the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India should be permitted to be invoked, by a person, without the statutory remedy of appeal being exhausted. In the present case, the petitioner has invoked the jurisdiction of this court under Article 226 of Constitution of India without exhausting the remedy of appeal provided under Section 19 of the A.P.G.S.T.Act, which reads thus:

“19. Appeals:

(1) Any dealer objecting to any order passed or proceeding recorded by any authority under the provisions of this Act other than an order passed or proceeding recorded by an Additional Commissioner or Joint Commissioner, or Deputy Commissioner under sub-section (4-C) of Section 14, may within thirty days from the date on which the order or proceeding was served on him appeal to

such authority as may be prescribed.

Provided that the Appellate Authority may within a further period of thirty days admit the appeal preferred after a period of thirty days if he is satisfied that the dealer had sufficient cause for not preferring the appeal within that period.

Provided further that an appeal so preferred shall not be admitted by the appellate authority concerned unless the dealer produces proof of payment of tax admitted to be due, or of such installments as have been granted, and the proof of payment of twelve and half per cent of the difference of the tax assessed by the assessing authority and the tax admitted by the appellant, for the relevant assessment year in respect of which the appeal is preferred.

(2) The appeal shall be in such form, and verified in such manner, as may be prescribed and shall be accompanied by a fee which shall not be less than fifty rupees but shall not exceed one thousand rupees as may be prescribed

(2-A) Where an appeal is admitted under sub-section (1), the appellate authority may, on an application filed by the appellant and subject to furnishing of such security or on payment of such part of the disputed tax within such time as may be specified order stay of collection of the tax under dispute pending disposal of the appeal.

(2-B) Against an order passed by the appellate authority refusing to order stay under sub-section (2-A) the appellant may prefer a revision petition within thirty days from the date of the order of such refusal to the Additional Commissioner or Joint Commissioner who may, subject to such terms and conditions as he may think fit, order stay of collection of the tax under dispute pending disposal of the appeal by the appellate authority.

(2-C) Notwithstanding anything in sub-section (2-A) or sub-section (2-B), where a dealer has preferred an appeal to the appellate Tribunal under Section 21, the stay, if any, ordered under sub-section (2-B) shall be operative till the disposal of the appeal by such Tribunal, and, the stay, if any ordered under sub-section (2-A) shall be operative till the disposal of the appeal by such Tribunal, only in case where the Additional Commissioner or the Joint Commissioner on an application made to him by the dealer in the prescribed manner, makes specific order to that effect.

(3) The appellate authority may, after giving the appellant an opportunity of being heard and subject to such rules of procedure as may be prescribed;

a. confirm, reduce, enhance or annul the assessment or the penalty, or both, or

b. set aside the assessment or penalty, or both, and direct the assessing authority to pass a fresh order after such further enquiry as may be directed; or

c. pass such other orders as it may think fit

d. pass such other orders as it may think fit

(4) Before passing orders under sub-section (3), the appellate authority may make such enquiry as it deems fit or remand the case to any subordinate officer or authority for an inquiry and report on any specified point or points

(5) Every order passed in appeal under this section shall, subject to the provisions of Sections 20, 21, 22 and 23 be final."

The rule that before invoking the extraordinary jurisdiction under Article 226 of the Constitution of India, the alternative remedy should be exhausted, is a rule of convenience and discretion and not a rule of law. When an efficacious alternative remedy is open to the litigant he is, normally, required to pursue that remedy and not invoke the extraordinary jurisdiction of the High Court and seek issuance of a prerogative writ. Proceedings under Article 226 of the Constitution of India are neither meant to be nor are they a substitute for an appeal provided under the statute. (**Transmission Corporation of A.P. Vs. Ch.Prabhakar**) . While the availability of an appellate remedy, under the statute, ought not to be read as a limitation on the power of the High Court under Article 226 of the Constitution of India, nevertheless it would need a very strong case to deviate from the principle that where a specific remedy is given by the statute, such remedy should be availed of. (**U.P.State Bridge Corporation Limited Vs. U.P.Rajya Setu Nigams, Karamchari Sangh**). When a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is no doubt a rule of policy, convenience and discretion and this court may, in exceptional cases, issue a discretionary writ of certiorari, particularly, where there is complete lack of jurisdiction for the officer, or authority or tribunal to take action or there has been a contravention of fundamental rights or there has been a violation of rules of natural justice or where the Tribunal has acted under a provision of law which is ultravires. (**Harbanslal Sahnia Vs. Indian Oil Corporation Limited ; Seth Chand Ratan Vs. Pandit Durga Prasad).**

Under Section 19 of the A.P.G.S.T. Act the appellate authority is entitled to examine, both questions of fact and law, come to a conclusion different from that of

the assessing authority on the very same set of facts as also to reduce or annul the order of assessment. While the several contentions, regarding infirmities and contradictions in the assessment order, cannot be said to be without merit, these are all matters to be urged before the appellate authority under Section 19 of the A.P.G.S.T. Act, more so, when these assertions are disputed in the counter affidavit and disputed questions of fact are not, normally, adjudicated in proceedings under Article 226 of the Constitution of India.

Before parting with the case, it is however necessary to emphasize the need for assessing authorities to exercise diligence while passing orders of assessment. The assessment order forms the basis for demand and levy of sales tax on the dealer. The A.P.G.S.T. Act further requires twelve and half percent of the disputed tax to be deposited before the appeal is entertained. It is an admitted fact, in the present case, that the assessing authority (Commercial Tax Officer) had relied on an overruled judgment in passing the assessment order. It is also not in dispute that the A.P.G.S.T. Act defines “works contract” which the assessing authority, on a bare perusal of the assessment order, seems to have been ignorant of. Assessment orders, erroneously passed, result in adverse consequences to the dealer who is mulcted with tax liability on the basis of such an order. Disregard to the basic requirements of law and failure to exercise necessary care and caution give rise to a general impression of indifference by authorities in discharging their statutory duties and obligations. Assessing authorities should ensure that such impressions are not permitted to gain ground.

In the facts and circumstances of the present case, we consider it inappropriate to exercise the discretionary jurisdiction under Article 226 of the Constitution of India in the petitioner’s favour as he has not exhausted the statutory remedy of an appeal under Section 19 of the A.P.G.S.T.Act.

The writ petition is accordingly dismissed at the admission stage. This order shall

not, however, preclude the petitioner herein from filing an appeal under Section 19 of the A.P.G.S.T. Act and in case an appeal is preferred the appellate authority shall consider the same on its own merits without being influenced by any observations made in this order.

_____

B.SUDERSHAN REDDY, J

_____

RAMESH RANGANATHAN,J

asp

Date: 08.08.2005

After pronouncement of the orders, Mr.Bhaskar Reddy – learned counsel for the petitioner – requests the Court to permit the petitioner to prefer appeal within two weeks from today. The appeal to be preferred by the petitioner within two weeks from today shall be entertained for disposal on merits by the appellate authority in accordance with law.

B.SUDERSHAN REDDY, J

RAMESH RANGANATHAN,J

Note:

C.C. in three days

B/o

mvb